IV. ENFORCEMENT AND CIVIL LAW

DHS seeks to protect and improve the health of all Californians. For the elderly, DHS ensures that nursing homes comply with federal and state requirements related to quality of care through its extensive oversight and enforcement activities. When an individual resident experiences poor or abusive care in a nursing home, that resident may notify DHS through its complaint process, initiating a review of the incident that can result in enforcement remedies. State options could include corrective action by the facility, fines, Medicare or Medi-Cal payment restrictions, or criminal action against the facility.

> "The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits."
>
> *–Welfare and Institutions Code, Section 15600 (h)*

The resident also has the right to pursue a private cause of action under civil law against the facility. A nursing home seeks liability insurance coverage as protection for the financial solvency of its operations should such civil action claims be filed. Currently, no statute requires facilities to notify DHS or any other government agency when a civil suit is filed against them alleging poor or abusive care.

From the perspective of the insurance market, providing liability insurance for nursing homes carries a higher degree of risk than in previous years. Companies that continue to write general and professional liability insurance in California have increased premiums and included more restrictive terms relative to the nature of the risk.

Health facility organizations believe that difficulties in securing liability insurance may lead to a decrease in the number of nursing homes and other residential care facilities. If such decreases were to occur, access to residential options for consumers would be affected. Providers believe the number of civil litigation cases being filed against facilities is the major reason for the problems with the availability and cost of liability insurance. Consumer organizations, on the other hand, believe facilities can manage

their risk by providing adequate quality of care. They also believe that limits should not be placed on the nursing home residents' rights to have an adequate legal remedy for poor care.

LEGAL ACTIONS COVERED BY LIABILITY INSURANCE

Available Data

This section discusses **medical malpractice** law, elder abuse law, Medicare/Medicaid fraud and abuse law, and legal enforcement remedies affecting the cost and availability of liability insurance for nursing homes. It should be noted, however, nursing homes are not required to notify DHS when civil actions are filed against them or to update DHS on the status of such actions. The data regarding the extent of legal activity is limited.

DHS has determined that Section 1305 of the H&S Code currently includes a requirement for liability insurers to report at least annually to DHS regarding claims activity against nursing homes. Insurers are to report any final judgment or settlement over $3,000 rendered against a facility for which they are providing liability insurance coverage. Although this language has been part of the H&S Code for 30 years, DHS found no documentation to indicate that the provision was implemented. The language in the H&S Code is similar to provisions in Section 801 of the Business and Professions (B&P) Code that requires every insurer providing professional liability insurance to physicians, to report to the California Board of Medical Quality, any settlement awards over $3,000 or a claim or action for damages for death or personal injury caused by the physician's negligence, error or omission in practice or rendering of unauthorized professional services.

The Medical Board of California received over 900 reports regarding physicians and surgeons. On Oct 1, 2002, Governor Davis signed SB 1950 into law, a bill that requires the Medical Board to disclose more information to the public about doctors who have settled a series of malpractice claims.

Liability Insurance Claims

Nursing home general or professional liability insurance normally pays for the damages and defense expenses resulting from a negligent act, error, or omission in caring for a nursing home resident. If a resident or the resident's family pursues a private civil action related to one of these categories, the standards of proof required and the remedies available can vary (see Appendix E for detail regarding the laws discussed in this section).

A recent American Health Lawyers Association seminar on Long Term Care and the Law, referenced potential financial loss sources for LTC facilities to be considered in a facility's risk management focus as:

- Abuse
- Falls

- Decubitis (Pressure Sores)
- Elopements
- Family Communication
- Documentation. [1]

Damages are the monetary compensation or indemnity that may be recovered by an individual or entity that has suffered loss. Damages also vary according to the type of civil action pursued. The types of damages pertinent to a discussion of liability insurance for nursing homes include:

- **Compensatory-** Compensation for a plaintiff's documented out-of-pocket expenses that result from injury or damage; for example, loss of earning or medical expenses.
- **General-**Compensation paid for harm for which no specific evidence of financial loss is required because such harm—for example, **pain and suffering**—is presumed to have occurred from the nature of the event.
- **Exemplary-**Compensation over and above property loss when the act is from malice—for example, wrongful acts, aggravated negligence, but not criminal.
- **Punitive-**Amount of money awarded by a court to "punish" the defendant for acts of gross negligence or outrageous conduct, normally intentional, irrespective of the amount of actual or compensatory damages.[2]

AB 1XX (MICRA legislation)…
"Will affect malpractice-insurance premiums only indirectly. If the net effect is to improve the quality of health care and expedite the handling of malpractice cases while limiting the magnitude of the awards, the insurers' risk should diminish; and if risk diminishes, premiums should cost less. But the legislation's only direct effect on premiums would be through a provision empowering the state insurance commissioner to review, and even roll back, any premium increase exceeding 10 percent."

–"The Malpractice Bill: Neither a Placebo nor a Panacea," *California Journal,* October 1975

Medical Malpractice Laws in California

California's first experience with controversial debates on the issue of medical liability occurred in the early 1970s. Physicians' insurance premiums soared due to multi-million dollar medical malpractice awards; sharp increases in the number of claims filed and damage awards granted, and widespread media coverage. In 1975, major legislation was enacted in California to address the problem.

The Medical Injury Compensation Reform Act (MICRA)

MICRA instituted several major changes to medical liability statutes:

- limited to $250,000 the amount of non-economic losses an injured patient could recover to compensate for pain and suffering;
- cut the time limit for filing cases from four years to three;
- created a scale of "contingency fees" for attorneys based on the amount of the award (the higher the judgement, the smaller the percentage for the attorney); and
- Required 90-day notification of intent to sue.

Passage of MICRA did not eliminate debate regarding medical liability issues. During the period after MICRA, other laws were introduced that affected civil legal actions that might be taken against nursing homes that could affect their liability coverage.

Civil Liabilities Reform Act–Punitive Damages

In 1987, the State Legislature passed the Civil Liabilities Reform Act, which in part, amended civil procedure governing exemplary and punitive damages in tort litigation (Civil Code 425.13). Punitive damages were created by the courts to punish defendants for egregious conduct and, by setting an example, to deter others from similar conduct.

The law specifies procedural and substantive requirements that must be met before a punitive damages claim may be asserted. Punitive damages may not be covered by liability insurance. If such acts are deemed to be "willful," Section 533 of the Insurance Code prohibits the coverage. Providers argue that the high dollar amounts for punitive damages against nursing homes affect the willingness of insurance companies to write LTC liability policies, regardless whether or not the insurer carves out the coverage for punitive damages.

LAWS AFFECTING THE ELDERLY

While MICRA and subsequent reforms addressed important provider issues related to medical malpractice litigation, older Americans were beginning to identify serious limitations in the law that affected their ability to pursue judicial relief.

Federal Older Americans Act

Congress passed the Older Americans Act in 1965 to protect the rights of the elderly and encourage individual states to promulgate elder rights laws. In 1992 Congress added the Vulnerable Elder Rights Protection Program to the Act, providing federal funding for national and local elder rights programs aimed at reporting and preventing elder abuse.

OBRA 87 Protections

As discussed in Section III. Quality of Care Oversight and Reimbursement, OBRA 87 also initiated major changes, establishing a framework to ensure nursing home residents will receive quality services when their care is paid for by Medicare and Medicaid.

In 1991, significant amendments were made to the Code of Federal Regulations (CFR) identifying specific requirements to ensure resident rights in a facility. A resident "has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility," according to 42 C.F.R. Section 483.10. A lengthy list of requirements is included in the regulation.

California—Elder Abuse Civil Protection Act (EDACPA)

During the '70s and '80s, concerns for the treatment of nursing home residents were not only being addressed at the national level. In California, The Little Hoover Commission

demonstrated continued concern with the quality of life of California's elderly population in general, and its nursing home population in particular. The Little Hoover Commission on California State Government Organization and Economy is an independent, State oversight agency that was created in 1962.

The Commission's mission is to investigate state government operations and –through reports, recommendations and legislative proposals—promote efficiency, economy, and improved service. In a 1983 Commission report entitled *The Bureaucracy of Care, Continuing Policy Issues for Nursing Home Services and Regulation,* the Commission extensively studied conditions in California nursing homes and made a series of recommendations that led to the enactment of the Nursing Home Patients' Protection Act (NHPPA) of 1985.[3]

In 1991, SB 679, (Mello, Chapter 774, Statutes of 1991), or EDACPA, significantly modified existing California law for elder abuse cases, including enhanced remedies to award attorney's fees and specified damages in defined cases. Prior to that time, although abused elders or their conservators could, under MICRA, sue someone who had financially or physically abused them and be compensated for pain, suffering and other losses, two barriers made such cases difficult to win:

- The abuser did not have to pay for the victim's suffering if the victim died before a lawsuit was filed and a guilty verdict was issued.
- Few attorneys would take abuse cases, due to the difficulty of trying them and the risk in taking a case in which a fee would not be collectable.

The legislative intent of EDACPA recognized that elders and dependent adults may be subjected to abuse, neglect, or abandonment and that the State has a responsibility to protect these persons. The specific changes were:

- definition of the circumstances in which the resident (or elderly in other situations) could file under EDACPA;
- reasonable attorneys fees and costs;
- general damages for pain and suffering, in an amount no greater than $250,000;
- an exception to Probate Code Section 573, to allow damages for pain and suffering even after the resident's death; and
- Punitive damages under specific circumstances that demonstrated inappropriate action by an employee and advance knowledge or conscious disregard on the part of the licensee.

Other Laws Related To Elder Abuse and Care Issues

Federal and State False Claims Act

The purpose of the Federal False Claims Act, and the State False Claims Act is to find liability against persons who submit fraudulent financial claims against the government. A person who reports an action under either of these acts is known as a ***"Qui-Tam Relator."*** Reduction of fraudulent billing is a main objective of the legislation, but successful cases have been filed under the Act for provision of poor quality care by a health facility. To be reimbursed for Medicare or Medicaid services, health providers

certify that they will comply with the written standards for quality care. If the care can be proved substandard, the reimbursement claims submitted were false.

In 1986, Congress sought to strengthen its *qui tam* provisions to support government efforts to reduce fraud and abuse in public programs. The *qui tam* changes included:
- a share of 15-30 percent of the funds recovered in a successful case;
- reasonable attorney's fees and expenses; and
- Protection of whistleblowers from employer retaliation.

Federal Authority

The OIG for DHHS has primary authority for protecting the Medicare Program and its beneficiaries. In addition to various enforcement initiatives, OIG also utilizes several programs that rely on collaboration, cooperation and voluntary compliance on the part of the health care industry to fight health care fraud and abuse.

On March 16, 2000, OIG published its voluntary Compliance Program Guidance for Nursing Facilities in the Federal Register. The guidance contained seven elements OIG determined to be fundamental to an effective compliance program:
- implementing written policies, procedures and standards of conduct;
- designating a compliance officer and committee;
- conducting effective training and education;
- developing effective lines of communication;
- enforcing standards through well-publicized disciplinary guidelines;
- conducting internal monitoring and auditing; and
- Responding promptly to detected offenses and developing corrective action.[4]

Although the guidance information is not mandatory, the OIG also has "Corporate Integrity Agreements" (CIAs) that it can use as part of settlements or other investigations or audits arising under a variety of false claims statutes. A provider consents to the agreement in exchange for being able to continue billing under the Medicare program. Key elements of the agreements include the provider hiring a compliance officer and engaging an Independent Review Organization (IRO), such as an accounting, auditing, or consulting firm, to assess the adequacy of the provider's performance under the CIA. OIG held a roundtable discussion with providers operating under CIAs in July 2001. Overall, providers indicated they would continue to operate compliance plans and retain compliance officers after their CIAs expire.[5]

State Authority

The California Bureau of Medi-Cal Fraud and Elder Abuse within the Office of the Attorney General has responsibility to investigate and prosecute those who abuse and neglect patients in Medi-Cal-funded facilities such as nursing homes, developmental treatment facilities, and hospitals. DHS works closely with the Bureau on elder abuse cases. Whenever DHS receives a complaint that alleges abuse, neglect, or misappropriation of resident funds or property, DHS notifies and faxes a copy of the complaint to the Bureau upon receipt. DHS continues to investigate the complaint and provides documentation and assistance should the Bureau decide to prosecute.

The Bureau comprises three programs designed to bring increased accountability to those who abuse California's elderly population:

- ***Violent Crimes Unit–***investigates and prosecutes physical elder abuse committed by individual employees against patients in elder care facilities;
- ***Facilities Enforcement Team***– investigates and prosecutes corporate entities such as skilled nursing homes, hospitals, and residential care facilities, for adopting policies that lead to neglect and/or poor quality of care; and
- ***Operation Guardians–***conducts surprise, on-site inspections of nursing homes to identify and correct violation of laws designed to protect elderly patients.

The Bureau of Medi-Cal Fraud and Elder Abuse relies upon many statutes in criminal and civil prosecutions of Medi-Cal fraud and elder abuse (see Appendix F).

State Enforcement Actions (See inset). DHS, in its role as licensing agency for all nursing homes in California, and representing the federal government for Medicare and Medicaid certification, has substantial legal authority to ensure quality nursing home care.

ENFORCEMENT ACTIONS RELATED to ELDER ABUSE and CARE ISSUES

DHS, both as the licensing agency for the State and as the oversight agency representing the federal government for Medicare and Medicaid certification, monitors nursing home compliance with laws and regulations.

- The 2567 form, documentation DHS prepares as the basis to report and document its sanctions, is often used as evidence in civil cases against nursing homes.
- Complaints filed against facilities are often used as evidence in civil cases
  - ✓ 1/1/01-12/31/01: 8,614 complaints and **facility-reported occurrences** (26%)
  - ✓ 1,488 were for neglect/abuse (48% facility-reported occurrences)
- Sanctions available include:
  - ✓ directed plan of correction (POC),
  - ✓ directed in-service training,
  - ✓ denial of payments for new admissions,
  - ✓ denial of payment for all residents,
  - ✓ state monitoring,
  - ✓ **civil money penalties (CMPs)** (state and/or federal)
    - 7/1/00-6/30/01: Federal CMPs imposed over $1.5 million for 87 actions
    - 1/1/01-12/31/01: State citations assessed over $4.6 million for 1006 citations
  - ✓ temporary suspension of a license (state)
  - ✓ license revocation (state)
  - ✓ termination (federal)
  - ✓ receivership (state)
- Federal and state statute and regulation specify due process provisions for all actions
- Disciplinary actions against certified nurse assistants (CNAs) result in their de-certification
  - ✓ 7/1/98-3/1/02: over 275,000 CNA/HHA applications processed
  - ✓ 7,889 certifications denied or revoked for convictions (3.7%)

The **Form 2567** that DHS prepares as the basis to report and document its sanctions, and the **citation** (state monetary penalty) are public records. DHS enforcement documents may be used to support or dispute allegations. The **Plan of Correction (POC)** the facility submits, however, cannot be used in a legal proceeding as an admission against the facility, unless allowed by the court.

EFFECT OF LEGAL ENVIRONMENT ON LIABILITY INSURANCE FOR NURSING HOME INDUSTRY

MICRA and EDACPA form a strong foundation of civil law in California. Both recognize the importance of health and safety considerations for all citizens, and the right of individuals, especially the elderly and dependent, to protection from abuse and neglect.

MICRA prescribed parameters for civil actions at a time when the Legislature determined that escalating malpractice insurance costs threatened access to medical treatment for California citizens. The EDACPA protections for the elderly were successful in their objective to ensure that a victim of abuse could find an attorney to handle her or his case. Medi-Cal fraud and abuse litigation involved facility employees and recipients of government financed health care in legal proceedings aimed at reducing fraud and abuse by health facilities.

The public perception of care provided in nursing homes, however, continues to be increasingly negative. Litigation, monetary awards, and federal and state investigations of poor quality care, even abuse, communicate an inherent risk to residing in nursing homes.

Insurers, who in the past provided general and professional liability coverage for the long-term care industry, are determining the risk element for the nursing home industry is too unpredictable to be profitable. These insurers are either exiting the market or providing much more stringent and limited coverage.

CNA, one of the large admitted insurers in California still writing liability insurance for nursing homes, provided the following assessment to explain increases in claims severity and claims frequency trends:

> "The impact of state statutes intended to clarify the rights of long-term care facility residents…and their application in a litigious environment has affected the climate with respect to this business segment."[6]

RELEVANT CASE LAW

The passage of MICRA and EDACPA did not resolve the controversy related to what civil law protections are appropriate for elderly recipients of health care services. Several of the significant court decisions are summarized as follows:

MICRA

The validity of MICRA was tested in *Hoffman v. U.S., C.A.*9 (Cal.) (1985). The Court found that MICRA was supported by a rational basis, and did not violate the equal protection clause of the Federal Constitution. Reduction of medical malpractice premiums was a legitimate state purpose, and it was reasonable to believe that placing a ceiling on non-economic damages would help reduce such premiums.

The California Supreme Court upheld the constitutionality of damage awards limits and collateral source rules in *Fein v. Permanente Medical Group* 695P.2d 665 (1985). In *Fein,* the court stated that the Legislature was responding to an insurance crisis in the medical malpractice area, and therefore limiting non-economic damages to $250,000 under MICRA was rationally related to a legislative purpose.

Periodic payment of damage awards was upheld in *American Bank and Trust Co. v. Community Hospital of Los Gatos. Saratoga, Inc.* 683 P.2d 670 (1984). MICRA attorney fees statute was upheld in *Roa v. Lodi Medical Group, Inc.,* 211 Cal. Rptr 77 (1985).

EDACPA

The application of MICRA under the EDACPA was analyzed in *Kay Delaney v. Calvin Baker, Sr.,* 20 Cal.4th23, (1999). The California Supreme Court examined the relationship between the heightened remedies available under EDACPA and the application of MICRA to actions based on professional negligence. The court determined that if the plaintiff can meet the requirements under the EDACPA for bringing a cause of action, they are entitled to those enhanced remedies, despite the MICRA statutes that may govern individual cases of professional negligence.

Punitive Damages

In *Neal v. Farmers Insurance Exchange, (*1978) 21 Cal.3d 910, 927-928 (Neal), the court stated that:

> "Punitive damage award would be reversed only when it appears excessive as a matter of law or where it is so grossly disproportionate that it raises the presumption the award was the result of passion or prejudice."

In making that determination, the court considers: (1) the reprehensibility of the defendant's conduct; (2) the amount of compensatory damages; and (3) the defendant's wealth.

The federal standard applied to reversing a punitive damage award was examined in *BMW of North America v. Gore, (*1996) 517 U.S. 559, 562, 574 [134 L.Ed.2d 809, 825-826] (BMW). The court found a punitive damage award would be reversed if "the award violated the 14th Amendment's prohibition against arbitrary or excessive punishment of tortfeasors. The court would look at the amount of punitive damage award with the civil penalties authorized or imposed in similar cases.

Covenant Care, Inc. v. Superior Court of Los Angeles County, (2001) 107 Cal.Rprt.2d 291, is now under review by the California Supreme Court. The question relates to whether Civil Procedure Section 425.13 that governs claims for punitive damages against health care providers sued for "professional negligence," also applies to claims of "abuse or neglect" asserted against them under EDACPA.[7]

CONTESTED LEGAL ISSUES

Nursing home providers and insurance industry representatives see several factors behind the increased cautiousness in underwriting the nursing home business. Consumer and resident advocates tend to view the issues from a different perspective.

- **Does EDACPA encourage litigation and erode the damage limitations afforded in MICRA?**

Insurance Industry/Nursing Home Providers:

- ✓ EDACPA, intended to ensure elders appropriate access to legal services, is so open-ended that it makes virtually every facility in the state a ready target for litigation.
- ✓ The punitive damage provisions are ineffective in limiting use of the provisions. Punitive damage claims are routinely filed against nursing homes. Full court review should be required before allowing a pleading for punitive damages against a facility.
- ✓ More law firms are beginning to specialize in elder abuse cases, advertising on the Internet and teaching "how to" seminars across the country.
- ✓ Provision in EDACPA for billing of attorneys' fees is being misused. The provision encourages over-billing.
- ✓ The relationship of the licensee to facility staff is presented as "custodial" rather than "professional" in nature to avoid MICRA requirements.

Consumer/Resident Advocates:

- ✓ EDACPA is specific in defining what constitutes an abuse case under the Act.
- ✓ The burden of proof is similarly specific for punitive damages.
- ✓ Liability insurance is being used as an excuse for tort reform that allows facilities to get away with abuse and poor quality care.
- ✓ Facts do not support the assertions of increased litigation.
- ✓ The nursing home industry should put pressure on substandard providers to improve quality or get out of the business.

- **Is regulatory information inappropriate for use in medical liability cases?**

Nursing Home Providers:

- ✓ Survey findings are unreliable in many instances.
- ✓ Regulatory information with no direct connection to a case is used to prejudice the jury.

Consumer/Resident Advocates:

- ✓ Survey and enforcement records of a facility are often used to establish a pattern and practice of poor care. Without this information, any abuse or neglect case can look like an isolated incident.

Regulatory Perspective:

- ✓ The function of survey and enforcement records is to protect the health of Californians. It is the public policy to require remedial or corrective action on the part of the facility, once deficient practices or a violation has been identified.

Implications

Provider and insurance industry representatives believe that state statutes such as EDACPA, originally intended to clarify the rights of LTC facility residents, "and their application in a litigious environment, have affected the climate with respect to this business segment."[8] Consumer attorney and advocate organizations feel that "California nursing home verdicts encourage decent care and are a vital check to balance the system." [9]

A review of available data reveals that the State and DHS have little information on the affect of civil litigation in improving the quality of care in nursing homes. Although deterring abusive practices for future residents is often a reason cited by plaintiffs for litigation. In many cases, residents and their representatives settle with the nursing homes under confidential agreements that are known only to the parties. If quality improvement and resident protection are the goals of all stakeholders, then the effectiveness of certain aspects of current statute needs to be reviewed.

[1] Keith Becker, "Surviving the Long Term Care Liability Crisis: Key Strategies and Solutions," in presentation on *Long term care and the Law,* American Health Lawyers Association, February 2002.
[2] Pam Ahrens, *Risk Management Handbook,* Office of Insurance Management, Risk Management, State of Idaho, October 1999, p 86. www.state2.id.us/adm/insurance .
[3] *Report on the Medical Care of California's Nursing Home Residents: Inadequate Care, Inadequate Oversight,* The Little Hoover Commission, February 1989, p. 1.
[4] Federal Register, Vol. 65, No. 52, March 16, 2000, p. 14289.
[5] *Results of the Corporate Integrity Agreement Survey (Abstract),* Office of Inspector General, August 2001, p.1. www.oig.hhs.gov/fraud/cia.
[6] Hillary Lewis, Letter from CNA Insurance to DHS Licensing and Certification, January 17, 2002.
[7] Robert H.Moran, Letter from California Association of Health Facilities to the Department of Health Services, January 11, 2002.
[8] Lewis, op.cit.
[9] Cartwright, op.cit.